SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1121

LENA ESDERTS, Administratrix of the Estate of WILLIAM J. ESDERTS, Deceased,

Petitioner,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES A. DOOLEY,
111 W. Washington Street,
Chicago, Illinois 60602,
Attorney for Petitioner.

MIDWEST LAW PRINTING CO., 326 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-3969

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The real issue in this case involves the function of the court and jury in an action under the Federal Employers' Liability Act. Can a railroad worker bringing an action in the state court be deprived of that type of

trial which this Court has mandated by the failure of the state court to adhere to its criteria governing other trials in actions at law within the state? The errors were described by the Intermediate Appellate Court as "truncated",[1]

This Court has held that the Federal rights created by it must be given uniform application in Federal courts as well as state courts, and that whenever a state opens its court to a plaintiff seeking to enforce these federally created rights, it must give that plaintiff "the full scope of these rights". (*Garrett* v. *Moore-McCormack,* 317 U.S. 239, 244, 245, 249; *Brown* v. *Western R. of Ala.,* 338 U.S. 294, 296.)

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[1] "The errors laid at the door of the trial judge are the following: telling the jury that the full statements would be given to them and ruling that the statements would go to the jury room; recalling the jury after they had commenced deliberating and reading the statements to the jury himself, and creating an unfair dilemma for the plaintiff by ruling that the complete statements would go to the jury room unless plaintiff agreed to his reading them to the jury. Although this truncated list of errors appears formidable, it becomes less so when the errors are evaluated in conjunction with what actually took place at the trial." (App. Ct. Opinion, p. 6a Pet.)

* Respondent claims petitioner "mistakenly" refers to the derail sign being painted after the occurrence and weeds being cut thereafter. We refer to the cross examination of its section foreman: "The derails were painted as well as the switch targets on June 6, 1952. I knew they needed painting. * * * Every work that I do, there is a record of. There is no record of cutting the weeds before this occurrence. In June and July, the weeds were mowed after the accident." (Abstract 14)

Certainly a litigant can be just as effectively deprived of his right to a jury trial by the method of conduct of the trial as by the direction of a verdict. This Court must recognize that a fair trial is an integral part of the Act itself. Serious trial errors uncountenanced in other actions at law in the state courts can be the vehicle of deprivation of this important right. Thus, for a trial court to intervene on behalf of the respondent, which failed to introduce during the time of reception of evidence the contents of the statements admitted solely for the purpose of impeaching and to confront petitioner's counsel with the "Hobson's choice" of either sending the statements to the jury room or recalling the jury from their deliberation and reading the statements to them is hardly the function of a court in an action of this character as outlined by this Court in the *Rogers* case. (*Rogers* v. *Mo. Pac. R. Co.*, 352 U.S. 500)

So too, respondent does not undertake to justify its jury argument, indulged in over the objection of petitioner, concerning the forum of the action as well as the erroneous statements concerning contributory negligence and respondeat superior, the latter doctrine having no application whatsoever in an action of this character.

A statement admitted in evidence does not mean that the entire document is before the jury. Only the impeaching portions of out-of-court statements admitted for the purpose of impeachment are to be read to the jury during the reception of evidence. This the Appellate Court recognized in noting that the respondent was at fault in not introducing the impeaching portions and in likewise telling the jurors that they did have the statements

in their jury room. Yet it compounded the error of the trial court.(*)

Again, it is not denied that the statements admitted for the purpose of impeaching a witness do not go to the jury room.

When respondent states that petitioner did not object to the statements going to the jury room, it is neglecting the hard fact of the record. The Appendix to the Petition (P. 21) contains the objections by petitioner concerning these documents going to the jury room. This occurred when the exhibits were sought to be sent to the jury room. It was then that the question arose and therefore the only proper time to object.

(*) "The defendant was at fault in not following through with the impeachment process on exhibits 4 and 11 after the court sustained the plaintiff's objections to the method of impeachment being pursued by the defendant. There was a basis in law for the objections. It has been held that when it is desired to impeach a witness by a statement written or signed by him, and the proper foundation has been laid by permitting the witness to read the statement and proving by him or others that he wrote it himself, or that what he said was reduced to writing and was signed by him, the statement should be introduced into evidence during the cross examiner's case and the portions contradictory to the witness' testimony read to the jury. *I.C. R.R. Co.* v. *Wade,* 206 Ill. App. 523, 69 N.E 565 (1904); *Hapke* v *Brandon,* 343 Ill. App. 524, 99 N.E. 2d 636 (1951)." (App. Ct. Opinion, pp. 12a, 13a Pet.)

"But having stated to impeach these exhibits the defendant was at fault in not completing the impeachment even though the preliminary questions had not been fully answered. The defendant also was at fault in telling the jurors that they would have the statements in the jury room." (App. Ct. Opinion, p. 14a Pet.)

Nor is it any answer to state that the Illinois rule prohibiting impeaching statements to go to the jury room is a question of local practice and may differ in other states. Certainly, Illinois courts must regard an action under this statute just as it would any other action at law and cannot make rules applicable only to actions under FELA.

Obviously, petitioner was deprived of rebutting any impeaching matters in the statements. During the introduction of evidence, as the Appellate Court pointed out, it was incumbent upon the respondent to offer in evidence those parts of the statements it contended were impeaching. It did not. The proofs were closed. Hence, there was no necessity to offer any evidence concerning the contents of the statements or to go into the circumstances under which they were obtained.

We might note that petitioner never referred to the statements in his opening argument at the close of the case, but respondent in its final argument read to the jury contents never received in evidence over specific objections of petitioner. (Abstract 32, 35). These objections were overruled. It was in his closing argument that petitioner's counsel read other parts of the statements eluded to by respondent. What we have said concerning respondent's closing arguments has not been answered.

The Proceedings in the Illinois Supreme Court.

Nor has respondent correctly apprised the Court of the proceedings in the Illinois Supreme Court. That Court denied plaintiff's petition for leave to appeal from the judgment of the Appellate Court at the November Term when it had but 5 judges and not the constitutional requirement

of 7 and at a time when under the Illinois Constitution the affirmative vote of 4 judges was necessary to obtain admission of the case to the Supreme Court (Article 6, Constitution of Illinois, Ill. Rev. Stat. Vol. 1, p. 18).

Plaintiff, at the January Term, moved the Court to vacate the order denying her petition for leave to appeal and to have a full complement of the Court act upon the petition, but the Illinois Supreme Court denied the motion to vacate the order denying the petition for leave to appeal and to allow the entire court to pass upon it. Obviously the Illinois Supreme Court never reached the petition for leave to appeal, since it denied the motion to vacate its order denying the petition. Obviously, the plaintiff did not have the full scope of the federally created rights in his state court action. (*Garrett* v. *Moore-McCormack*, 317 U.S. 239, 244, 245, 249; *Brown* v. *Western R. of Ala.*, 338 U.S. 294, 296).(*) So, also, this constituted a violation of the concept of equal protection. This Court in *Bolling* v. *Sharp*, 347 U.S. 497 (1954) held that although the Fifth Amendment does not contain an equal protection clause, as does the Fourteenth Amendment, the concepts of equal protection and due process are not mutually exclusive.

(*) The Illinois Supreme Court cannot, as does this Court under certain circumstances, change the number of affirmative votes necessary to obtain the allowance of the petition for leave to appeal.

CONCLUSION.

We respectfully submit that the Petition for Writ of Certiorari to the Supreme Court of Illinois ought to be granted and on the granting of said petition, the judgment reversed.

Respectfully submitted,

JAMES A. DOOLEY,
111 W. Washington Street,
Chicago, Illinois 60602,
Attorney for Petitioner.